



James M. Graziano

jgraziano@archerlaw.com
856-354-3090 Direct
856-673-7090 Direct Fax

Archer & Greiner, P.C.
One Centennial Square
Haddonfield, NJ 08033
856-795-2121 Main
856-795-0574 Fax
www.archerlaw.com

December 5, 2018

Via E-mail and CMECF

Honorable Brian R. Martinotti, U.S.D.J.
United States District Court
Clarkson S. Fisher Federal Building & U.S. Courthouse
Room 341
402 E. State Street
Trenton, NJ 08608

RE: PennEast Pipeline Cases on Attached Exhibit A

Dear Judge Martinotti:

We represent the Plaintiff PennEast Pipeline Company, LLC ("PennEast") in the matters pending before Your Honor. We write to alert the Court about two Orders and Opinions entered this week by the Honorable Malachy E. Mannion, U.S.D.J., in the United States District Court for the Middle District of Pennsylvania. Judge Mannion's Orders and Opinions granted PennEast's applications (1) for partial summary judgment, finding that PennEast has the substantive right to condemn property rights pursuant to the Order issued by the Federal Regulatory Energy Commission on January 19, 2018 (the "FERC Order") and (2) granting PennEast a preliminary injunction for immediate access to the property. See Exhibit B. We believe the Opinions and Orders speak for themselves and do not require explanation or interpretation. We simply felt obligated to alert the Court to this new authority.

Thank you for Your consideration.

Respectfully submitted,

/s/ James M. Graziano
JAMES M. GRAZIANO

JMG/mlb

cc: All counsel of record via e-mail
All unrepresented parties via regular mail

215605437v1

EXHIBIT A

3:18-cv-01585-BRM-DEA
3:18-cv-01588-BRM-DEA
3:18-cv-01590-BRM-DEA
3:18-cv-01597-BRM-DEA
3:18-cv-01603-BRM-DEA
3:18-cv-01609-BRM-DEA
3:18-cv-01613-BRM-DEA
3:18-cv-01621-BRM-DEA
3:18-cv-01624-BRM-DEA
3:18-cv-01638-BRM-DEA
3:18-cv-01641-BRM-DEA
3:18-cv-01643-BRM-DEA
3:18-cv-01646-BRM-DEA
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3:18-cv-01658-BRM-DEA
3:18-cv-01660-BRM-DEA
3:18-cv-01662-BRM-DEA
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3:18-cv-01986-BRM-DEA
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3:18-cv-02000-BRM-DEA
3:18-cv-02001-BRM-DEA
3:18-cv-02003-BRM-DEA
3:18-cv-02004-BRM-DEA
3:18-cv-02014-BRM-DEA
3:18-cv-02015-BRM-DEA
3:18-cv-02016-BRM-DEA
3:18-cv-02020-BRM-DEA
3:18-cv-02025-BRM-DEA
3:18-cv-02028-BRM-DEA
3:18-cv-02031-BRM-DEA
3:18-cv-02033-BRM-DEA
3:18-cv-02139-BRM-DEA

EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

**PENNEAST PIPELINE COMPANY, :
LLC**

Plaintiff : CIVIL ACTION NO. 3:18-281

v. : (JUDGE MANNION)

**A PERMANENT EASEMENT OF :
0.60 ACRE ± AND A TEMPORARY
EASEMENT OF 0.60 ACRE ± IN :
TOWAMENSING TOWNSHIP,
CARBON COUNTY, :
PENNSYLVANIA, TAX PARCEL
NOS. 16-56-A73.05 AND :
16B-56-A7; SUSANA V.
BULLRICH; BANK OF AMERICA, :
N.A.; AND ALL UNKNOWN
OWNERS :
Defendants :
ORDER**

In accordance with the memorandum issued today, (Doc. 39) addressing plaintiff's motion for partial summary judgment, **IT IS HEREBY ORDERED THAT** PennEast Pipeline Company, LLC, has the substantive right to condemn the following easements and rights of way on the subject Property (identified in the Verified Complaint by Carbon County Tax Parcel Nos. 16-56-A73.05 and 16B-56-A7):

1. A permanent right of way and easement of 0.60 ± as depicted on Exhibits A-1 and A-2 hereto for the purpose of constructing,

operating, maintaining, altering, repairing, replacing and removing a 36-inch diameter pipeline and all related equipment and appurtenances thereto (including but not limited to cathodic protection equipment) for the transportation of natural gas, as approved by the Order of the Federal Energy Regulatory Commission, dated January 19, 2018, Docket No. CP-15-558-000 ("FERC Order"); and conducting all other activities as approved by the FERC Order; together with all rights and benefits necessary for the full enjoyment and use of the right of way and easement, including rights of ingress and egress for the above-stated purposes. Further, Defendants shall not excavate, change the grade of or place any water impoundments or structures on the right of way and easement without the written consent of Plaintiff, nor may Defendants plant any trees, including tress considered as a growing crop, on the permanent right of way and easement; or use said permanent right of way or any part thereof in such a way as to interfere with Plaintiff's immediate and unimpeded access to said permanent right of way, or otherwise interfere with Plaintiff's lawful exercise of any of the rights herein granted without first having obtained Plaintiff's approval in writing; and Defendants will not permit others to do any of said acts without first having obtained Plaintiff's approval in writing. Plaintiff shall have the right from time to time at no additional cost to Defendants to cut and remove all trees including trees considered as a growing crop, all undergrowth and any other obstructions that may injure, endanger or interfere with the construction and use of said pipeline and all related equipment and appurtenances thereto;

2. A temporary workspace easement totaling 0.60 acre ± as described on Exhibits A-1 and A-2 hereto for use during the pipeline construction and restoration period only for the purpose of ingress, egress and regres and to enter upon, clear off and use for construction and all activities required by the FERC ORDER.

s/ Malachy E. Mannion

MALACHY E. MANNION
United States District Judge

DATE: December 3, 2018

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PENNEAST PIPELINE COMPANY, :
LLC

Plaintiff : CIVIL ACTION NO. 3:18-281

v. : (JUDGE MANNION)

A PERMANENT EASEMENT OF :
0.60 ACRE ± AND A TEMPORARY :
EASEMENT OF 0.60 ACRE ± IN :
TOWAMENSING TOWNSHIP, :
CARBON COUNTY, :
PENNSYLVANIA, TAX PARCEL :
NOS. 16-56-A73.05 AND :
16B-56-A7; SUSANA V. :
BULLRICH; BANK OF AMERICA, :
N.A.; AND ALL UNKNOWN :
OWNERS :

Defendants :

MEMORANDUM

I. INTRODUCTION

Presently before the court is a motion for partial summary judgment (Doc. 15) filed by the plaintiff, PennEast Pipeline Company, LLC ("PennEast"). After considering the hearing testimony and opposing briefs, this court will **GRANT** plaintiff's motion.

II. BACKGROUND

On September 24, 2015, PennEast filed an application with the Federal Energy Regulatory Commission (“FERC”) under section 7(c) of the Natural Gas Act (“NGA”), 15 U.S.C. §717f(c), and parts 157 and 284 of the FERC’s regulations, to obtain a certificate of public convenience and necessity for its project to construct and operate a natural gas pipeline in Pennsylvania and New Jersey. (Doc. 2-2, at 2). FERC mailed a letter to affected landowners, describing the project and inviting them to participate in the environmental review process. (Doc. 2-2, at 36). On July 22, 2016, FERC issued a draft environmental impact statement (“EIS”), setting a public comment period from July 29, 2016 to September 12, 2016. (Doc. 2-2, at 37). FERC staff held six public comment meetings between August 15 and 17, 2016, at which over four hundred speakers commented. (Doc. 2-2, at 37). FERC also received over four thousand written comments in response to the draft EIS. (Doc. 2-2, at 37).

On November 4, 2016, FERC sent a letter to landowners regarding thirty-three route modifications and allowed an additional thirty day comment period. (Doc. 2-2, at 37). On April 7, 2017, FERC issued a final EIS. (Doc. 2-2, at 37). Thereafter, on January 19, 2018, FERC issued an order granting

PennEast a certificate of public convenience and necessity to construct and operate a new pipeline, known as the PennEast Project. (Doc. 2-2, at 2).

On February 6, 2018, PennEast filed a verified complaint in eminent domain (Doc. 1) against the defendants pursuant to Federal Rule of Civil Procedure 71.1. In order to construct, operate, and maintain the FERC-approved project, PennEast needs to obtain rights of way as described and depicted in Exhibits A-1 (Doc. 2) and A-2 (Doc. 2-1) attached to the complaint in this action. (Doc. 15-2, at 4). On April 30, 2018, PennEast filed a motion for partial summary judgment (Doc. 15) and a corresponding brief in support (Doc. 16). That same day, PennEast filed a motion for preliminary injunction (Doc. 17) and corresponding brief in support (Doc. 18). Defendant/landowner Susana V. Bullrich (“Bullrich”) filed a brief in opposition to both motions (Doc. 20, Doc. 21). Then, PennEast filed a consolidated reply brief to both motions on May 29, 2018. (Doc. 23). On November 27, 2018, a hearing was held before this court regarding PennEast’s motions.

III. LEGAL STANDARD

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A factual dispute is genuine if a reasonable jury could

find for the non-moving party, and is material if it will affect the outcome of the trial under governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary judgment stage, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Id.* at 249. Rather, the court must consider all evidence and inferences drawn therefrom in the light most favorable to the non-moving party. *Andreoli v. Gates*, 482 F.3d 641, 647 (3d Cir. 2007).

To prevail on summary judgment, the moving party must affirmatively identify those portions of the record, which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The moving party can discharge the burden by showing that “on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party.” *In re Bressman*, 327 F.3d 229, 238 (3d Cir. 2003); *see also Celotex*, 477 U.S. at 325. If the moving party meets this initial burden, the non-moving party “must do more than simply show that there is some metaphysical doubt as to material facts,” but must show sufficient evidence to support a jury verdict in its favor. *Boyle v. County of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). However, if the

non-moving party “fails to make a showing sufficient to establish the existence of an element essential to [the non-movant’s] case, and on which [the non-movant] will bear the burden of proof at trial,” Federal Rule of Civil Procedure 56 mandates the entry of summary judgment because such a failure “necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 322-23.

IV. DISCUSSION

The Natural Gas Act permits the holder of a certificate of public convenience and necessity issued by FERC to use eminent domain to acquire rights of way necessary to construct, operate, and maintain a project as approved by the FERC order. 15 U.S.C. §717f(h). Courts have held that the NGA authorizes a party to exercise the federal power of eminent domain if it meets the three-prong test set forth in the statute:

- 1) The party must hold a FERC Certificate of Public Convenience and Necessity;
- 2) The party has not been able to acquire the property rights required to construct, operate, and maintain a FERC-approved pipeline by agreement with the landowners; and
- 3) The value of the property sought to be condemned is more than \$3,000.

Transcontinental Gas Pipe Line Company, LLC v. Permanent Easement for 2.14 Acres, et al., No. 17-715, 2017 WL 3624250, at *2 (E.D.Pa. Aug. 23, 2017), *aff’d*, 907 F.3d 725 (3d Cir. 2018) (citing, e.g., *Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 304 (3d Cir. 2014)).

There is no dispute that PennEast has been issued an order from FERC (Doc. 12, at 4), that it has been unable to acquire the property rights in question to construct, operate, and maintain the FERC-approved pipeline by agreement with the landowners (Doc. 12, at 7), and that the value of the properties in question is greater than three thousand dollars (Doc. 12, at 7). Conversely, Bullrich does contest that PennEast is the holder a certificate of public convenience and necessity, reasoning that “the FERC Order is conditional and the project may never be built.” (Doc. 12, at 4). Despite the unambiguous language found in the FERC order, which grants PennEast a certificate of public convenience and necessity (Doc. 2-2, at 83), Bullrich has opposed the entry of partial summary judgment in this matter and presents several arguments in opposition to PennEast’s exercise of eminent domain. (Doc. 21). Bullrich alleges that: (1) this court lacks subject matter jurisdiction; (2) PennEast failed to show that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law¹; and (3) if her property is taken before a judicial pre-deprivation hearing is held, then the taking will violate her due process rights under the Fifth Amendment to the

¹ In her briefs, Bullrich alleged that PennEast was seeking rights beyond those approved by the FERC order. Following a hearing before this court, the parties met and revised PennEast’s proposed order so that no dispute remains. PennEast’s revised proposed order has been adopted by the court and all stipulated changes have been incorporated into the court’s order.

United States Constitution. (Doc. 21). These arguments are unpersuasive. Bullrich cannot establish any genuine issue of material fact as to the three conditions set forth in the Natural Gas Act required prior to the exercise of eminent domain by PennEast; therefore, PennEast is entitled to the entry of partial summary judgment in this matter.

Bullrich alleges that “this [c]ourt lacks subject matter jurisdiction until PennEast has acquired the authorizations required under federal law that are necessary for construction to begin.” (Doc. 21, at 6). In other words, “PennEast is simply not the holder of a certificate that is sufficiently final to take Mrs. Bullrich’s property.” (Doc. 21, at 12). While Bullrich does not dispute that FERC issued an order to PennEast, (Doc. 12, at 4), she argues the order is “conditional” and that PennEast does not have the right of eminent domain because they do not currently have the right to construct the pipeline. (Doc. 21, at 11).

The NGA does not contain a requirement that the holder of a FERC certificate must satisfy all conditions of the certificate prior to the exercise of eminent domain. To the contrary, the FERC order specifically states that

[u]nder section 7 of the NGA, the Commission has jurisdiction to determine if the construction and operation of proposed interstate pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, it is section 7(h) of the NGA that authorizes a certificate holder to acquire the necessary land or property to construct the approved facilities by

exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.

(Doc. 2-2, at 18).

“The FERC certificate in question does, in fact, contain prerequisite conditions, some of which remain unmet at this time.” *Transcontinental*, 2017 WL 3624250, at *6, *aff’d*, 907 F.3d 725 (3d Cir. 2018). However, Bullrich has not cited any binding authority holding that PennEast’s exercise of eminent domain is prohibited until the conditions in the FERC certificate are met. “It is true that there are conditions in the FERC certificate that [PennEast] will need to meet prior to commencing actual construction of the pipeline, but the fulfillment of these conditions is not a prerequisite to [PennEast’s] exercise of eminent domain” *id.*; if it were, some requirements—like surveying the property to comply with certificate conditions—would never be met and as a result, the pipeline would never be built.

Second, Bullrich argues that PennEast is not entitled to partial summary judgment because it has failed to satisfy its burden under Federal Rule of Civil Procedure 56. (Doc. 21, at 14). Specifically, Bullrich argues that “[e]ven if jurisdiction exists...summary judgment is inappropriate because PennEast has failed to foreclose the possibility that it will not be able to construct this project.” (Doc. 21, at 6). This assertion rests upon the same foundation as her previous argument—that the conditions of the FERC certificate must be

entirely met before any taking can occur. As previously stated, the NGA and the FERC order do not state that a certificate holder must meet all of the certificate conditions prior to the taking of property. Bullrich's argument, though repetitive, is not novel. The Third Circuit Court of Appeals recently issued a precedential decision in a similar case that discussed this very issue.

Transcontinental Gas Pipeline Company, LLC v. Permanent Easements for 2.14 Acres, et al., 907 F.3d 725 (3d Cir. 2018). In the decision, the Circuit Court discussed the landowners' "claim that because the FERC certificate was conditioned on certain requirements, some of which had not yet been met, the certificate could not be used to exercise eminent domain." *Id.* at 732. The Circuit Court noted that the District Court rejected this argument because the NGA does not require FERC certificate holders to satisfy all the certificate's conditions before exercising eminent domain, and because the certificate itself contained no such requirement. *Id.* In *Transcontinental*, the Third Circuit permitted a condemnation procedure where the District Court granted the plaintiff's motions for partial summary judgment and preliminary injunction before plaintiff met all of the conditions of the certificate order. *Transcontinental*, 907 F.3d 725. By allowing this procedure in *Transcontinental*, the Third Circuit has made Bullrich's argument—that FERC

certificate conditions must be entirely met prior to the taking of property under 15 U.S.C. §717f(h)—moot.

It is true that PennEast’s application to complete one of the FERC certificate conditions in New Jersey, has presently been denied. However, that denial by the New Jersey Department of Environmental Protection (“NJDEP”) was without prejudice. In fact, PennEast’s application was denied without prejudice because it lacked “necessary information to determine compliance with the freshwater wetlands rules.” (Doc. 20-2, at 2). Ironically, that information could only be obtained with access to a significant portion of the right of way in New Jersey, where access had been denied by the landowners. Without access to the New Jersey properties, PennEast was unable to complete the surveys necessary to supply the needed information in its application to the NJDEP. That denial was not final, nor on the merits. Rather, “PennEast may resubmit a new complete application when it has all of the required information as identified in the NJDEP’s letter...” (Doc. 20-2, at 2).

Now, Bullrich argues that PennEast should be prevented from taking her property in Pennsylvania because, as she argues, the NJDEP denial means the pipeline may never be built. Obviously, a similar denial could occur in Pennsylvania if PennEast is not allowed to access the property for survey

purposes and thereafter submit those results to the Pennsylvania Department of Environmental Protection (“PADEP”) for a review on the merits.

If the FERC certificate was to be interpreted as requested by Bullrich, no entry onto private property could take place before all pre-conditions were met, and yet, many of the pre-conditions cannot be met without access to the property. This contorted reasoning would make the FERC certificate nothing more than a meaningless piece of paper. Said another way, such action would effectively preclude PennEast from ever being able to submit a completed application to the PADEP. Since the approval of the PADEP is a condition of the FERC certification that must be met prior to receiving authorization to begin construction of the pipeline, without access to the Bullrich property, PennEast will never be able to fulfill the necessary preconditions and receive those approvals. Such a result would make a mockery of the process.

Lastly, Bullrich argues that a taking of her property before the D.C. Circuit Court decides her challenge to the validity of the FERC order is a violation of Bullrich’s due process rights. (Doc. 21, at 25). She also alleges that she cannot obtain full relief at a post-deprivation hearing. (Doc. 21, at 24). The Third Circuit has held that a landowner facing condemnation, who has received notice and the opportunity to respond in the FERC proceedings and will have the opportunity to litigate just compensation in the district court, has

received due process. *Transcontinental Gas Pipeline Company, LLC v. Permanent Easement for 2.59 Acres, et al.*, 709 Fed.Appx. 109, 112 (3d Cir. 2017). In addition to having the notice and opportunities laid out by the Third Circuit, Bullrich filed briefs and participated in oral argument in this court, filed a rehearing request with FERC, and filed an appeal in the D.C. Circuit Court of Appeals. Thus, Bullrich has been afforded more due process than is required by law.

In the alternative, Bullrich requests a stay in this matter until the D.C. Circuit Court issues a decision in her challenge to the FERC order. (Doc. 21, at 25). "The NGA explicitly provides that neither a request for rehearing before FERC nor judicial review can stay the effectiveness of a FERC certificate. *Transcontinental*, 907 F.3d at 740. Therefore, Bullrich's request for a stay shall be denied.

V. CONCLUSION

For the reasons set forth above, plaintiff's motion for partial summary judgment shall be **GRANTED**. An appropriate order shall follow.

s/ Malachy E. Mannion

MALACHY E. MANNION
United States District Judge

DATE: December 3, 2018

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PENNEAST PIPELINE COMPANY, :
LLC

Plaintiff : CIVIL ACTION NO. 3:18-281

v. : (JUDGE MANNION)

A PERMANENT EASEMENT OF :
0.60 ACRE ± AND A TEMPORARY :
EASEMENT OF 0.60 ACRE ± IN :
TOWAMENSING TOWNSHIP, :
CARBON COUNTY, :
PENNSYLVANIA, TAX PARCEL :
NOS. 16-56-A73.05 AND :
16B-56-A7; SUSANA V. :
BULLRICH; BANK OF AMERICA, :
N.A.; AND ALL UNKNOWN :
OWNERS :

Defendants :

ORDER

In accordance with the memorandum issued today, (Doc. 41) addressing plaintiff's motion for preliminary injunction, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff, PennEast Pipeline Company, LLC's ("PennEast") motion for preliminary injunction (Doc. 17) is **GRANTED**.
2. Upon filing the bond required below, PennEast is granted access and entry to the rights of way, described in the order issued today

addressing plaintiff's motion for partial summary judgment, for the performance of all survey activities required by the FERC to be completed before construction of the pipeline may commence.

3. PennEast shall post a bond in the amount of Ten Thousand dollars (\$10,000) as security for the payment of just compensation to defendants.
4. PennEast shall provide the landowner with at least a 72 hour notice before entering the rights of way to perform survey activities.

s/ Malachy E. Mannion

MALACHY E. MANNION
United States District Judge

DATE: December 3, 2018

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PENNEAST PIPELINE COMPANY, :
LLC

Plaintiff : CIVIL ACTION NO. 3:18-281

v. : (JUDGE MANNION)

A PERMANENT EASEMENT OF :
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NOS. 16-56-A73.05 AND :
16B-56-A7; SUSANA V. :
BULLRICH; BANK OF AMERICA, :
N.A.; AND ALL UNKNOWN :
OWNERS :

Defendants :

MEMORANDUM

I. INTRODUCTION

Presently before the court is a motion for preliminary injunction (Doc. 17) filed by the plaintiff, PennEast Pipeline Company, LLC ("PennEast"). After considering the hearing testimony and opposing briefs, this court will **GRANT** plaintiff's motion.

II. BACKGROUND

On September 24, 2015, PennEast filed an application with the Federal Energy Regulatory Commission (“FERC”) under section 7(c) of the Natural Gas Act (“NGA”), 15 U.S.C. §717f(c), and parts 157 and 284 of the FERC’s regulations, to obtain a certificate of public convenience and necessity for its project to construct and operate a natural gas pipeline in Pennsylvania and New Jersey. (Doc. 2-2, at 2). FERC mailed a letter to affected landowners, describing the project and inviting them to participate in the environmental review process. (Doc. 2-2, at 36). On July 22, 2016, FERC issued a draft environmental impact statement (“EIS”), setting a public comment period from July 29, 2016 to September 12, 2016. (Doc. 2-2, at 37). FERC staff held six public comment meetings between August 15 and 17, 2016, at which over four hundred speakers commented. (Doc. 2-2, at 37). FERC also received over four thousand written comments in response to the draft EIS. (Doc. 2-2, at 37).

On November 4, 2016, FERC sent a letter to landowners regarding thirty-three route modifications and allowed an additional thirty day comment period. (Doc. 2-2, at 37). On April 7, 2017, FERC issued a final EIS. (Doc. 2-2, at 37). Thereafter, on January 19, 2018, FERC issued an order granting

PennEast a certificate of public convenience and necessity to construct and operate a new pipeline, known as the PennEast Project. (Doc. 2-2, at 2).

On February 6, 2018, PennEast filed a verified complaint in eminent domain (Doc. 1) against the defendants pursuant to Federal Rule of Civil Procedure 71.1. In order to construct, operate, and maintain the FERC-approved project, PennEast needs to obtain rights of way as described and depicted in Exhibits A-1 (Doc. 2) and A-2 (Doc. 2-1) attached to the complaint in this action. (Doc. 15-2, at 4). On April 30, 2018, PennEast filed a motion for partial summary judgment (Doc. 15) and a corresponding brief in support (Doc. 16). That same day, PennEast filed a motion for preliminary injunction (Doc. 17) and corresponding brief in support (Doc. 18). Defendant/landowner Susana V. Bullrich (“Bullrich”) filed a brief in opposition to both motions (Doc. 20, Doc. 21). Then, PennEast filed a consolidated reply brief to both motions on May 29, 2018. (Doc. 23). On November 27, 2018, a hearing was held before this court regarding PennEast’s motions.

III. LEGAL STANDARD

“[O]nce a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the

issuance of a preliminary injunction.” *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004); *see also Transcontinental Gas Pipe Line Company, LLC v. Permanent Easements for 2.14 Acres, et al.*, 907 F.3d 725, 739 (3d Cir. 2018) (“And this Court too, albeit with less discussion, has ruled that where summary judgment is properly granted on a condemnation complaint, a preliminary injunction is appropriate as well.”).

In order to determine whether a party is entitled to a preliminary injunction, the court must consider: “(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and 4) whether granting preliminary relief will be in the public interest.” *Columbia Gas Transmission, LLC v. 1.01 Acres, et al.*, 768 F.3d 300, 315 (quoting *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012). “The first two factors are the ‘most critical.’” *Transcontinental*, 907 F.3d at 732 (quoting *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017)). Once the first two factors are met, “the court ‘then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.’” *Id.* at n.44 (quoting *Reilly*, 858 F.3d at 179)

IV. DISCUSSION

A. LIKELIHOOD OF SUCCESS ON THE MERITS

PennEast has already succeeded on the merits. “A preliminary injunction in a condemnation case is unlike preliminary injunctions in other types of civil matters because the plaintiff requests a decision on the merits of the matter at the same time.” *Transcontinental*, 2017 WL 3624250, at *7, aff’d 907 F.3d 725 (3d. Cir 2018). As in *Transcontinental* and *Columbia*, “there is no remaining merits issue; we have ruled that [PennEast] has the right to the easements by eminent domain. The only issue is the amount of just compensation—which will definitely be determined...but the result of which can have no affect [sic] on [PennEast’s] rights to the [easements].” *Transcontinental*, 2017 WL 3624250 at *7, aff’d 907 F.3d 725 (3d. Cir 2018) (quoting *Columbia*, 768 F.3d at 315).

Further, the Third Circuit has held “the NGA’s grant of standard condemnation powers to natural gas companies does not preclude federal courts from granting equitable relief in the form of a preliminary injunction when gas companies have obtained the substantive right to condemn and otherwise qualify for equitable relief. *Transcontinental*, 907 F.3d at 741. Thus, since it has been determined that PennEast has the substantive right to

condemn the rights of way at issue; the likelihood of success on the merits has been established. Accordingly, this factor favors PennEast.

B. IRREPARABLE HARM TO THE MOVING PARTY

PennEast will suffer irreparable harm if a preliminary injunction is not granted. In opposition to the preliminary injunction, Bullrich raises several arguments. Many of these arguments are identical to those raised in opposition to partial summary judgment and have already been addressed in a separate memorandum issued today. (Doc. 39). Bullrich's remaining arguments involve concerns that PennEast is attempting to acquire rights that are beyond the scope of the FERC order. Specifically, Bullrich alleges that PennEast is attempting to change the size of the pipe to be installed, install items and/or facilities not approved by the FERC, and use the pipe to transport a commodity other than natural gas. (Doc. 20). These arguments were addressed by counsel for both parties when they amended PennEast's proposed order following a hearing before this court. As such, these arguments are moot.

These arguments are insufficient to defeat PennEast's claims of irreparable harm. First, PennEast argues that they cannot begin construction until they survey the Bullrich property. (Doc. 18, at 13-14). Any delay in

construction can, in turn, impact PennEast's ability to meet the construction deadline of January 1, 2020 set forth in the FERC order. (Doc. 18, at 16). Aside from the obvious financial setbacks of failing to meet their construction deadline, additional delay also increases the risk that PennEast could forfeit their one million (\$1,000,000.) dollar permit application fee with the Pennsylvania Department of Environmental Protection ("PADEP"). The PADEP has informed PennEast that every survey must be complete before the agency will complete its administrative review and render a decision on PennEast's application, which must be completed prior to construction. If PennEast fails to submit this information to PADEP by December 31, 2018, its application may be considered withdrawn, potentially resulting in the loss of PennEast's one million dollar permit application fee. The survey of the Bullrich property is the only survey of Pennsylvania properties that still needs to be completed. As the final piece in the "construction puzzle," the effect of timeliness in this instance can have an enormous effect on the entire PennEast Project. *Transcontinental Gas Pipe Line Company, LLC v. Permanent Easement for 3.24 Acres, et al.*, No. 17-542, 2017 WL 3485753, at *3 (M.D.Pa. Aug. 15, 2017). As such, this factor weighs strongly in favor of PennEast.

C. HARM TO THE NON-MOVING PARTY

Bullrich will not incur greater harm as a result of the granting of a preliminary injunction. As decided above, PennEast has the substantive right to possession of the property in question. Thus, since PennEast will eventually obtain possession; the only issue is the timing of that possession.

[A]ny injury to [Bullrich] will arise from the [Natural Gas Act] and the FERC Order, and will occur regardless of whether the [c]ourt grants a preliminary injunction to [PennEast]. In the exercise of its discretion, the [c]ourt finds that the harm alleged by [Bullrich] weighs less heavily than the harms alleged by [PennEast]. *Constitution Pipeline Co.*, 2015 WL 12556145, at *5. Nothing indicates that [Bullrich] will suffer any greater harm by allowing [PennEast] to possess the property immediately instead of after trial and determination of just compensation. *Columbia Gas Transmission, LLC v. 0.85 Acres*, 2014 WL 4471541, at *7.

Transcontinental, 2017 WL 3624250, at *9, aff'd, 907 F.3d 725 (3d Cir. 2018).

Bullrich offers no argument as to why immediate possession of the property would harm her more than possession at a later date. During oral argument, when Bullrich's counsel was asked to proffer the harm that Bullrich would incur, she elected not to introduce any evidence of harm to Bullrich. Additionally, PennEast will post sufficient bonds upon the grant of the preliminary injunction; therefore, any amount of money damages that Bullrich may suffer will be secure and a remedy will be available. Thus, this factor weighs in favor of PennEast.

D. PUBLIC INTEREST

The grant of a preliminary injunction is in the public interest because it will give the general public, in a vast area, access to natural gas to heat their homes. "Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices. *Transcontinental*, 2017 WL 3485753, at *5 (citing *E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d at 830). In addition, FERC found the PennEast Project to be in the public interest when it issued PennEast a certificate of public convenience and necessity. For these reasons, this factor favors PennEast.

V. CONCLUSION

For the reasons set forth above, plaintiff's motion for preliminary injunction shall be **GRANTED**. An appropriate order shall follow.

s/ Malachy E. Mannion

MALACHY E. MANNION
United States District Judge

DATE: December 3, 2018

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